

# San Francisco Bay Conservation and Development Commission

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Scott's Jack London Seafood, Inc.  
2770 Camino Diablo, #B  
Walnut Creek, CA 94597

Respondent.

COMMISSION  
CEASE AND DESIST AND CIVIL PENALTY  
ORDER NO. CDO 2017.01

Effective Date: April 6, 2017

TO SCOTT'S JACK LONDON SEAFOOD, INC.:

## I. CEASE AND DESIST

Pursuant to California Government Code Section 66638, Scott's Jack London Seafood, Inc. , and all of its agents and employees, and any other persons acting on behalf of or in concert with it (collectively "Scott's" or "Respondent") is hereby ordered to cease and desist all activity in violation of BCDC Permit No. 1985.019.09B, BCDC Permit No. 1985.019.22A, or the McAteer-Petris Act ("MPA") at Jack London Square in Oakland, as described herein. Specifically, Scott's is ordered to:

A. Cease and desist from violating BCDC Permit Nos. 1985.019.09B and 1985.019.22A, and the McAteer-Petris Act.

B. Fully comply with requirements of Sections III and IV of this Cease and Desist and Civil Penalty Order ("Order").

## II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings and this Order includes: (1) all documents and other evidence cited herein including Attachment A – Additional Findings; and (2) all additional documents listed in the Index of Administrative Record, Attachment B hereto.

A. BCDC Permit No. 1985.019.09B, as amended through October 7, 1997 ("the Permit"), issued jointly to Scott's and the Port of Oakland ("Port"), authorizes the construction, use, and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza at Jack London Square in Oakland, for shared public and private use at a ratio of 80% public to 20% private, and the installation of café seating, benches, lighting, and other site furnishings within the pavilion and larger, approximately 23,000-square-foot plaza.

B. BCDC Permit No. 1985.019.022A, as amended through October 22, 2014 ("the Port's Permit"), issued to the Port, authorized certain development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets at Jack London Square.

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C. In or about December 2011, Scott's contacted BCDC staff regarding certain modifications to the pavilion proposed by Scott's. Between December 2011 and November 2012, BCDC staff and Scott's continued to discuss, BCDC staff provided comments on, and Scott's sought BCDC staff approval of various potential modifications to the pavilion proposed by Scott's. As of November 2012, staff informed Scott's that it had not obtained BCDC staff approval of its proposed pavilion modifications and stated that Scott's should coordinate with the Port, and that Scott's and the Port should jointly present a revised proposal to BCDC.

D. In December 2012, BCDC staff learned that Scott's had commenced construction of certain modifications to the pavilion without obtaining approval from BCDC staff or the Commission, which upon completion in March 2013, included an unauthorized permanent metal-frame doorway and new retractable wall panel system, and that Scott's had also installed planters in a public access area without authorization.

E. On May 16, 2013, BCDC's Chief of Enforcement issued, pursuant to section 11386 of the Commission's regulations (14 C.C.R. § 11386), an enforcement letter to Scott's and the Port describing a number of alleged violations of the MPA and/or the Permit, including:

1. Construction of an unauthorized metal-framed doorway, storage area, and stage, and installation of multiple planters, in a public access area;
2. Failure to obtain BCDC staff approval of design and construction plans prior to replacing the former tent walls with a retractable wall panel system used to enclose the pavilion;
3. Failure to provide six years of reports of private events in the pavilion;
4. Failure to record a public access legal instrument for the pavilion; and
5. Failing to install and maintain all the public access improvements at the pavilion for at least 292 days per year.

F. The May 16, 2013, enforcement letter directed Scott's and the Port to take certain actions to retain the opportunity to resolve the alleged violations with standardized fines, as specified in 14 C.C.R. § 11386, including:

1. Remove the metal-framed doorway, storage area, and planters from the public access area;
2. Submit and obtain BCDC staff approval of a full set of plans for the retractable wall panel system;
3. Submit six years of past due reports of private events for the pavilion meeting the requirements of the Permit; and
4. Submit and obtain BCDC staff approval of a legal instrument to record the pavilion public access area; and
5. Install and repair certain public access improvements.

G. Following receipt of the May 16, 2013, enforcement letter, Scott's did not remove the unauthorized structures and improvements. Instead, Scott's continued to use the pavilion for private events and engaged in discussions with BCDC staff over an approximately two-year period regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized structures or improvements either by BCDC staff, through plan review and approval, or by potential amendments to the Permit and the Port's Permit. Scott's made two presentations regarding their various proposals to BCDC's Design Review Board, on February 10, 2014 and April 6, 2015. As of the date of this Order, Scott's has not removed or obtained approval of the unauthorized construction of the metal-framed entry doorway, storage area and stage, or retractable wall panel system, or of the unauthorized installation of the multiple planters in the public access area.

H. After learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff continued its enforcement investigation. That investigation revealed numerous additional alleged violations of the Permit or the Port's Permit, including but not limited to, Scott's extensive non-Permit complaint use of the pavilion for private events over an approximately 12-year period.

I. In or about September 2015, BCDC staff informed Scott's and the Port that the Executive Director intended to initiate an enforcement proceeding regarding the numerous violations of the Permit and the Port's Permit, including, but not limited to the unresolved issues regarding Scott's unauthorized construction in a public access area, that would likely result in the Commission issuing a cease and desist and administrative civil penalty order against Scott's and the Port. Scott's and the Port requested an opportunity to seek to negotiate a proposed settlement with BCDC.

J. On July 19, 2016, the Executive Director, Scott's and the Port agreed to a settlement in principle on the terms of a proposed stipulated order, subject to review and approval of the proposed order by the Commission's Enforcement Committee and by the Commission.

K. On October 20, 2016, the Enforcement Committee held a public hearing and adopted the staff's recommendation that the Commission issue the proposed stipulated order.

L. On November 3, 2016, the Commission rejected the Enforcement Committee's recommended enforcement decision (i.e., adoption of the proposed stipulated order). The Commission provided comments on certain issues raised by the alleged violations and directed staff to commence a formal enforcement proceeding if staff and Scott's and the Port were unsuccessful in returning to the Enforcement Committee within two months with a different proposed order that responded to and took into account the direction provided by the Commission.

M. By letter dated December 8, 2016, to BCDC's Chief Counsel, Marc Zeppetello, from Scott's counsel, Michael P. Verna, Scott's provided a settlement proposal to staff. After reviewing Scott's proposal, and after further discussions between Mr. Zeppetello and Mr. Verna regarding the prospects for reaching an agreement on a proposed settlement, staff determined that the proposal was not responsive to the Commission's direction and that it would not be

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possible to reach an agreement with Scott's and the Port on a revised proposed stipulated order that would be acceptable to the Commission. Therefore, on December 19, 2016, staff commenced a formal enforcement proceeding by mailing to Scott's and the Port a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint").

N. On January 23, 2017, Scott's and the Port each submitted their respective Statement of Defense and accompanying supporting documents. On February 16, 2017, the Enforcement Committee held a public hearing on this matter at which it considered the staff's presentation of the Executive Director's recommended enforcement decision, presentations by Scott's and the Port, and public comment by a number of parties. The Enforcement Committee adopted the Executive Director's recommended enforcement decision with modifications. Among other modifications, the Enforcement Committee recommended that the Port be dismissed from this action and that the proposed penalty be reduced from \$841,100 to \$395,360, payable in three annual installments and with the opportunity for Scott's to be entitled to a waiver of 15% of the penalty, in the third year, if Scott's timely complies, and maintains compliance, with this Order.

O. In summary, the violations or categories of violation of the Permit or the Port's Permit documented by BCDC staff's enforcement investigation include the following:

1. Unpermitted development by unauthorized construction in public access areas of a metal-framed entry doorway, wood and metal-framed walls, multiple moveable wall panels and ceiling tracks in the pavilion; storage area and stage; roof extension and planters.
2. Non-Permit compliant use of the pavilion, in violation of Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion, during the period 2004-2015:
  - a. Providing fewer than 292 public use days per year;
  - b. Providing, on average per month during winter season, fewer than five (5) public use weekend days and nights;
  - c. Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
  - d. Holding, on average per month during summer season, more than three (3) private use weekend days and nights;
  - e. Providing fewer than three (3) public use weekend days and nights per month; and
  - f. Holding more than two consecutive private use days.
3. Unpermitted use of the Franklin and Broadway Street plazas by placing tents and stanchions, storing event related equipment (including planters), and displaying promotional vehicles;

4. Untimely submittal of private event schedules as required by Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion;
5. Failure to record a public access legal instrument for the pavilion public access area prior to commencement of construction, as required by Special Condition II-B-3, Permanent Guarantee;
6. Failure to provide all required public access improvements during public use days, as required by Special Condition II.B.5, Improvements Within the Public Access Area; and
7. Failure to obtain plan approval prior to installation of public access improvements, as required by Special Condition II.A, Specific Plans and Plan Review.

P. The pavilion modifications constructed by Scott's including, but not necessarily limited to, the metal entry doorway, retractable wall panel system, roof extension, and storage shed and stage are unauthorized and include components and dimensions that staff has advised Scott's and the Port have adverse impacts on public access requirements of both the Permit and the Port's Permit. Unless and until the Commission acts favorably to approve proposed modifications to the pavilion, the as-built pavilion modifications shall remain unauthorized and subject to removal and/or reconstruction. Moreover, the Commission cannot act on a request to authorize proposed pavilion modifications until Scott's and the Port submit a complete application to amend the Permit that complies with the Commission's regulations pertaining to material amendments to a major permit as outlined in 14 C.C.R. §§10310, 10824, and Appendices D, E, F.

Q. The additional findings set forth in Attachment A hereto, and incorporated by reference herein, more fully describe each of Scott's and the Port's violations or categories of violation, and include information regarding the dates of violation and references to supporting evidence.

### **III. CONDITIONS**

A. On and after the Effective Date of this Order, Respondent shall cease and desist from all activity in violation of the Permit, the Port's Permit, and the McAteer-Petris Act.

B. **Make Public Access Available.** On and after the Effective Date of this Order, Respondent shall make the pavilion and all other public access areas around the pavilion (except for areas occupied by a built-in unauthorized structure, such as the storage shed and pavilion walls and panels) available to the public for unrestricted public access, as required by Special Condition II.B.1 of the Permit and Special Condition B.II.1 of the Port's Permit, except as otherwise provided in accordance with Special Condition II.B.2 of the Permit.

C. **No Storage of Equipment In or Unauthorized Use of Public Access Areas.** On and after the Effective Date of this Order, Scott's shall cease and desist from storing, and shall not store, any restaurant equipment or site furnishings in any required public access areas at any time,

and shall cease and desist from using, and shall not use, any portion of the Franklin and Broadway plazas for private events, to store any restaurant equipment or site furnishings, or to display promotional materials.

**D. Planter Removal.** No later than 15 days after the Effective Date of this Order, Scott's shall permanently remove all planters from the area around the pavilion and shall not place or storage planters within the Commission's jurisdiction without Commission authorization.

**E. Compliance with Permit Exhibit A, Guidelines for Private Use of Public Pavilion.** On and after the Effective Date of this Order, Respondent shall comply fully with Special Condition II.B.2 of the Permit, Public Use of the Pavilion, and shall use the pavilion for private events only as specified in Exhibit A to the Permit, "Guidelines for Private Use of the Public Pavilion," including but not limited to using the pavilion for no more than 73 days of private use annually.

**F. Submit Complete Applications to Amend the Permit.** No later than 45 days after the Effective Date of this Order, Respondent and the Port shall submit to the Executive Director a fully complete and properly executed application to amend the Permit. The application shall include the following:

1. The application to amend the Permit shall request after-the-fact authorization for the following structural components of the pavilion that Scott's constructed without authorization: (1) the permanent wall and retractable wall panel system along portions of the exterior of the pavilion; (2) the stage along the western interior boundary of the pavilion; (3) the storage area behind the stage; and (4) the structure that connects the roof of the pavilion to the roof of the restaurant. In preparing their application, Respondent and the Port shall take into account the plans depicting the proposed public pavilion modifications presented to the Design Review Board on April 6, 2015, and the DRB's comments on those plans. The application shall also request authorization for new entrance doors into the pavilion, which would be integrated into the retractable wall panel system and installed by Scott's to replace the existing permanent door structure and metal framing at the entrance to the pavilion that Scott's constructed without authorization. The application shall also include: (1) detailed architectural plans for the proposed project including but not limited to new entrance doors and any modifications to the retractable wall panel system necessary to integrate the doors into that system; (2) documentation of discretionary approval and CEQA review from the City of Oakland; (3) a statement of total project costs; and (4) payment of the appropriate application filing fee. The application shall not include a request to increase use of the pavilion for private events.
2. The application to amend the Permit shall include a public access plan for the pavilion and the public access areas around the pavilion based on the conceptual plan that Scott's proposed, and BCDC staff modified, during a meeting on August 28, 2015, that takes advantage of existing elements, considers factors pertaining to existing limitations, and attempts to unify the public space inside and outside of the

pavilion. The plan shall provide high quality chairs placed both inside and outside the pavilion; repair existing paving beneath the pavilion and toward Water Street (some areas have been poorly patched and require replacement pavers); in the plaza east of the pavilion and north of Kincaid's, remove trees, use vertical lights to create and angled "procession" towards the water, incorporate a few simple permanent concrete seawalls around an area with decomposed granite paving (and place tables and chairs within this area), provide benches in a line along the water facing east toward Pescatore restaurant, and provide planted screens around Kincaid's walls and trash areas.

**G. Provide Public Access Improvements Required by the Permit.** No later than 30 days after the Effective Date of this Order, Respondent shall provide all improvements within the public access area required by Special Condition II.B.5 of the Permit including: (1) at least four public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott's; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events or other approved events, as authorized by the Permit.

**H. Record Legal Instrument.** No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, Scott's and the Port shall submit proof of recordation with Alameda County of a legal instrument that guarantees the public access area required by Special Condition II.B.1 and 2 of the Permit, in accordance with Special Conditions II.B.3 and 4 of the Permit. For reference purposes, the public access area over which the legal instrument is to be recorded is shown on Exhibit A of the Port's Permit as "Scotts Pavilion." The recorded instrument may acknowledge the 66-year restraint on the alienation of granted public trust lands; however, it must affirm that so long as the Permit remains valid, the permittees are required to have a valid recorded instrument guaranteeing the public access required by the Permit and that a failure to provide that dedication will constitute a violation of the Permit.

**I. Submit Pavilion Events Schedules.** No later than 30 days after the Effective Date of this Order, Scott's shall submit to BCDC all past-due quarterly event schedules, as required by Special Condition II.B.2.c of the Permit. The past-due event schedules to be submitted pursuant to this Paragraph are those for the first quarter of 2013, the 4<sup>th</sup> quarter of 2015, and the first and second quarters of 2017. In addition, commencing May 15, 2017, Scott's shall submit to BCDC by no later than the 15<sup>th</sup> of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.

**J. Further Review By The Commission.** If Respondent and the Port fail to submit a complete application to amend the Permit by no later than 45 days after the Effective Date of this Order, in accordance with Condition III.F, above, or if the Executive Director has not filed the application as complete by no later than July 10, 2017, the Executive Director shall schedule a public hearing before the Commission to report on the status of Respondent's and the Port's application, their compliance with the Permit since January 1, 2017, and Scott's compliance with the terms of this Order. At such hearing, the Commission may, if recommended by the

Executive Director, order that this enforcement proceeding be reopened and that the Commission consider modifying this Order to revoke the Permit and to order Respondent and the Port to remove any or all structures within the shoreline band on the state tidelands occupied by the pavilion.

#### IV. CIVIL PENALTY ORDER

A. Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA or a BCDC permit in an amount of which shall not be less than \$10 nor more than \$2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than \$30,000 for a single violation.

B. Government Code Section 66641.9(a) states:

*In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

C. **Nature of the Violations.** Scott's violated the requirements of the Permit repeatedly and consistently, as follows:

1. **Non-permit Compliant Use of the Pavilion.** As documented on pages 8 through 17 in the Violation Report/Complaint, Scott's regularly held more private events than allowed by the Permit and operated the pavilion in numerous other ways that violate the requirements of the Permit.
2. **Unauthorized Use of the Franklin and Broadway Street Plazas.** Scott's regularly displayed a promotional vehicle in the Broadway Street Plaza and stored event-related equipment including planters in the Franklin Street Plaza. Scott's was repeatedly notified that these activities were unauthorized yet continued to commit the violations.
3. **Event Schedules and Scheduling.** Respondent and the Port habitually failed to submit quarterly reports and, to a lesser extent, annual summaries of scheduled events.
4. **Public Access Improvements.** Scott's failed to place the tables, chairs and signs in the pavilion when it was in public use almost continuously since 1998. As of the date of the Violation Report/Complaint, Scott's was posting only one of the two required moveable signs and it was not located in the pavilion where it is required to be located.



5. **Recordation of Legal Instrument for the Public Access Area.** Respondent and the Port have failed to resolve this issue despite the fact that Commission staff provided all the information necessary to achieve compliance with this requirement in a letter dated December 12, 2013.
6. **Failure to Obtain Plan Approval for the Public Access Improvements.** Respondent failed to obtain plan approval for the public tables, chairs and signage prior to constructing the pavilion.

D. **Circumstances of the Violations.** On multiple occasions, BCDC staff described to Scott's the permit requirements and the proper corrective actions and requested that actions and events remain within the authorized numbers. Despite these meetings and communications, the same unauthorized conduct continued. Circumstances of this matter support the conclusion that violating the BCDC permit was an intentional business decision by Scott's, whereby potential BCDC penalties may have been factored into decisions to proceed unabated over at least a 12-year period.

E. **Extent of Violations.** The non-permit compliant elements of the violations have both spatial and temporal components. The facts demonstrate the long duration of these violations and the expansion of private use beyond the limits of the pavilion into the Broadway and Franklin Street Plazas.

F. **Gravity of the Violations.** The open views of the estuary afforded by the space occupied by the pavilion are the only unobstructed views of the estuary that are available to persons approaching from Franklin Street. Therefore, the obstruction of those public views by Scott's unauthorized private events is a significant detriment to the public.

1. **Adverse Impacts on Public Access.** Each and every violation cited in the Violation Report/Complaint adversely impacts existing required physical and visual public access in and adjacent to the pavilion.
2. **Unauthorized Construction of the Pavilion Enclosure System.** Scott's knowingly and intentionally commenced and completed construction of its new pavilion enclosure system without the necessary Commission staff or Commission approval.
3. **Permit Application Filing Process.** Respondent and the Port failed to submit two complete applications to retroactively authorize those elements of the pavilion construction project eligible for retroactive approval. In addition, Respondent has failed to submit a revised public access proposal.
4. **Failure to Cooperate**
  - a. On May 30, 2013, during a site visit with the Commission's Executive Director, Mr. Fagalde stated he would not remove the permanent metal-framed entry doorway;
  - b. During a meeting with Ms. Miramontes and Ms. Klein on April 17, 2014, Mr. Fagalde said he could not remove the permanent metal-framed entry doorway;

- c. During a meeting with Commission staff on November 18, 2014, Mr. Gallagher said he could not remove the permanent metal-framed entry doorway;
- d. As these communications show, it was not a matter of not being able to remove the permanent metal-framed entry doorway from the project for a 3.5-year period, but rather an unwillingness to remove it. This became apparent when, on February 20, 2015, Respondent submitted a plan proposing to replace the permanent metal-framed entry doorway with additional retractable wall panels that include an entry doorway;

**G. Susceptible to Removal or Resolution.** Whether the violation is susceptible to removal or resolution:

**1. Susceptible**

- a. The unpermitted construction of the new pavilion enclosure system is susceptible to resolution through the combined removal of portions of the new pavilion enclosure system and after-the-fact approval of the remainder of it; and
- b. The failure to gain approval of a legal instrument to permanently guarantee the public access area and/or record an approved legal instrument is also susceptible to resolution by obtaining staff approval of a legal instrument and subsequently recording it.

The maintenance of public access areas free from storage of restaurant related equipment.

The provision of all required public access improvements (public access tables, chairs and signs).

Use of the pavilion in compliance with the Permit (*i.e.*, 292 days/year of unrestricted public access, etc.).

**2. Not Susceptible.** The following violations are not susceptible to removal or resolution:

- a. The multitude of past permit non-compliant uses, such as but not limited to the provision of fewer than 292 public access days at the pavilion, from 2004 through 2016 and continuing through the present;
- b. The past installation, storage and display of unauthorized structures and materials in the Broadway and Franklin Street Plazas;
- c. The past failure to submit quarterly reports of proposed events in a timely manner;
- d. The past failure to submit annual reports in a timely manner; and
- e. The failure to provide all of the required public access tables, chairs and signs between 2000 and the present.

H. **Cost to State.** The estimated costs to the state in pursuing this enforcement action total at least 1,109 hours and a cost of over \$83,224 through the date of issuance of the Violation Report/Complaint, and additional costs have accrued since that time.

I. **With Respect to the Violator**

1. **Ability to Pay and Effect on Business.** Scott's has provided "profit/loss" financial statements that include annual net profit figures. For each of the three most recent years, 2014-2016, Scott's earned an average annual net profit of approximately \$548,549. In addition, in response to a subpoena issued by the Executive Director, Scotts has produced its balance sheets for 2014 and 2015. Those balance sheets include the following figures that are relevant to Scott's ability to pay and the effect of any penalty on its ability to continue in business:

<b>Balance Sheet Description</b>	<b>2014</b>	<b>2015</b>
Inter Company Account Receivable (Current Asset)	\$6,048,315	\$6,646,394
Total Current Assets	6,847,473	\$7,229,226
Retained Earnings	\$4,996,157	\$5,394,308
Total Stockholders Equity	\$5,975,582	\$6,245,857

These average annual net profit and balance sheet figures indicate that Scott's has the ability to pay the penalty imposed by the Commission.

2. **Voluntary Removal or Resolution.** The Commission finds no evidence that Scott's has made any effective effort to voluntarily remove the unauthorized structures. Instead, the evidence cited on pages 34 through 38 in the Violation Report/Complaint demonstrates a steady pursuit of project completion and retention of unauthorized construction in direct contradiction to the information and direction provided by BCDC staff. On the contrary, Scott's has protracted this enforcement mater by its stubborn belief that it can perpetually operate the pavilion in disregard of its permit and the law.
3. **Prior History.** Respondent has repeatedly and consistently violating the Permit and the MPA since at least 2000 as shown by the evidence cited in the Violation Report/Complaint and the findings of this Order.
4. **Culpability.** Scott's is fully responsible and thus culpable. Scott's executed the Permit, attesting that it understood the permit conditions, and has proceeded for 15 years to ignore the requirements of its Permit and the MPA, as well as the direction from many members of the BCDC staff.

5. **Economic Savings.** The Commission is not in a position to quantify any economic savings to Respondent resulting from the violations, but Scott's has clearly benefitted economically from deferring removal of the unauthorized construction at the pavilion while continuing to over use the pavilion for private events. Similarly, Scott's has profited from the events in excess of 73 per year that it holds in the pavilion.

J. **Such other matters as justice may require.** No business located within BCDC's jurisdiction other than Scott's has made such extensive use of a dedicated public access space for private profit. No other business within BCDC's jurisdiction has so flagrantly, extensively, and knowingly violated the terms of its Permit and the MPA. Moreover, as of the date of this Order, all but one of the violations (plan approval) are ongoing and Respondent has neither removed the unauthorized structures, filed as complete the permit amendment application necessary to seek authorization for the unpermitted construction, nor ceased the non-compliant and illegal uses of the pavilion and the unpermitted uses of the Franklin Street Plaza.

K. Based on consideration of the relevant factors set forth in Government Code Section 66641.9(a), the penalty amounts authorized by Government Code Section 66641.5(e), and the preceding findings, the Commission hereby finds that an administrative civil penalty of \$395,360 is justified to resolve this matter. Scott's shall pay the total penalty amount in three equal installments, of \$131,786.67 each, over a three-year period, in accordance with Paragraph IV.M, below. Provided, however, that if the Executive Director determines that Scott's has complied with this Order and the Permit in accordance with Paragraph IV.L, below, Scott's shall be entitled to a waiver of 15% of the total penalty amount, or \$59,304, and this amount shall be deducted from the third annual installment payment.

L. Scott's shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines that Scott's has complied fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017. By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

M. Pursuant to Government Code Section 66647, Scott's shall remit payments to the Commission, by cashier's checks, payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund as follows: (1) within 30 days of the Effective Date of this Order, a payment of \$131,786.67; (2) by no later than May 7, 2018, a payment of \$131,786.67; and (3) by no later than May 7, 2019, a payment of \$131,786.67, unless the Executive Director has determined, in accordance with Paragraph IV.L, above, that Scott's is entitled to a waiver of 15% of the total penalty amount, in which case the payment shall be \$72,482.67.

**V. TERMS**

A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to \$6,000 for each day in which such violation persists. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

C. Scott's must conform strictly to this Order.

D. This Order does not constitute a recognition of property rights.

E. This Order is effective upon issuance thereof.

**VI. OPPORTUNITY FOR JUDICIAL REVIEW**

Under Government Code Section 66639, within thirty (30) days after service of a copy of a cease and desist order issued by the Commission, any aggrieved party may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of the order in any judicial proceedings brought to enforce the order or for other civil remedies.

DATED: April \_\_\_, 2017

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LAWRENCE J. GOLDZBAND  
Executive Director  
San Francisco Bay Conservation and  
Development Commission

**List of Attachments**

Attachment A: Additional Findings

Attachment B: Revised Index of Administrative Record